FILE COPY.

Office Supreme Court U
FILED
NOV 21 190
JAMES H. McKENNEY,
Cl

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1904.

CITY OF OKLAHOMA CITY,
Plaintiff in Error
VS.
FRANK McMASTER,
Defendant in Error.

No. 137.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

ANSWER TO MOTION TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT THEREOF, AND ALTERNATIVE MOTION TO SUPPLY STATEMENT OF FACTS.

STATEMENT OF FACTS OF THE CASE.

S. A. McGinnis, City Attorney,
C. Porter Johnson, Frank Dale
and A. G. C. Bierer,
Counsel for Plaintiff in Error

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1904.

CITY OF OKLAHOMA CITY,
Plaintiff in Error
VS.
FRANK McMASTER,
Defendant in Error.

No. 137.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

ANSWER TO MOTION TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT THEREOF, AND ALTERNATIVE MOTION TO SUPPLY STATEMENT OF FACTS.

STATEMENT OF FACTS OF THE CASE.

This is an action brought in the District Court of Oklahoma County, Oklahoma Territory, by Frank McMaster against the City of Oklahoma City in ejectment, to recover a parcel of land. (page 21.) The City first demurred to plaintiff's petition (page 22), then answered (page 23), admitting

the corporate existence of the defendant and setting up that the land described is a part of the original townsite of the City of Oklahoma City, and a street and highway thereof, as the same appeared by the original plat and survey of the city, approved by the Board of Townsite Trustees of Oklahoma City, and had been such for more than a year before the approval of the plat.

To this answer reply was made by McMaster, which reply denied the averrments therein which contradicted the allegations of plaintiff's petition, but did not deny the allegations that this land was and had been for the time given a part of the streets of Oklahoma City.

On the trial of the case in the District Court of Oklahoma County, the only evidence of title offered by plaintiff was the patent issued by the President of the United States to the Townsite Trustees, and certain findings of fact made by Judge Burford in the case of Frank McMaster against the Townsite Trustees pending in the District Court of Canadian County, and a certain order made thereon by Judge Burford in the same case while holding Court in Kingfisher County. (See pages 34 to 38). Judgment was rendered in the case for the plaintiff, and after some other proceedings, appeal taken to the Supreme Court of the Territory.

The District Court rendered only a general judgment, and made no findings of fact or conclusions of law, but simply found, ordered adjudged and decreed that plaintiff was the legal and equitable owner of the property sued for, and rendered judgment also for damages, the damages being based of course on the decree of plaintiff's title. (page 47).

The Supreme Court passed upon the case in a clear, specific and elaborate manner, and made a statement of facts of the case and conclusions of law which are contained in the following statement of the case and opinion of the Court, and dissenting opinion by Justice Pancoast, which appears on pages 58 to 72 inclusive, as follows:—

In the Supreme Court of the Territory of Oklahoma, June Term, 1903.

Filed June 6, 1903.

THE CITY OF OKLAHOMA CITY,

Plaintiff in Error,

vs. No. 1126.

FRANK MCMASTER, Defendant in Error.

SYLLABUS.

1. Where errors are assigned in the petition in error, but are not mentioned in the argument or brief of counsel, and are not relied upon in the argument or brief for a reversal of the judgment complained of, they will be deemed waived and abandoned, and will not be regarded in this court.

2. Where an occupying claimant has entered upon public lands which are open to settlement, and has made settlement thereon, for homestead purposes, and has legal vested rights therein, such rights cannot be taken from him for public use, except by due process of law, and the payment of just and reasonable compensation therefor.

Error from the district court of Oklahoma county.

B. F. Burwell, trial judge.

Affirmed.

Appearances: Jno. H. Wright and Douglas and Douglas, for plaintiff in error. Cotteral and Horner, and Frank McMaster for defendant in error.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error, Frank McMaster, against the plaintiff in error, the City of Oklahoma City, in the district court of Oklohoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, towit, lots numbers one and two of block number twenty-four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof. The original petition in said case is in words and figures as follows:

"TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3d District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant.

PETITION.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class, and located in Oklahoma county, aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described, and fully entitled to the possession thereof, and of which the defendant unlawfully keeps him out of the possession, being a part of the southeast quarter (¼) section thirty-three (33) town 12, north range 3 west in said county, and Territory more particularly described as follows: Commencing at

a point in said city on the southeast corner of block twenty-three (23), as shown by the trustees' plat, being the plat now in use in said city, and running thence southerly on a straight line, with the west line of Broadway street, as shown by said plat, thirty-three and ten one hundreds (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning, one hundred and forty feet (140), thence south at a right angle with the line aforesaid' fifty (50) feet, thence east parallel with said east and west line, first named one hundred and forty feet (140), thence north parallel with said north and south line, fifty (50) feet to the place of beginning.

3rd. That prior to the filing hereof being far more than four weeks thereto, plaintiff presented his claim to defendant for uses, rents and profits thereon, as well as a demand for possession of said real estate, described as aforesaid, but that the defendant refused to pay said claim, and still retains possession of said real estate, to the damage of plaintiff in the sum of two hundred and fifty (250.00) dollars, per year, since the 14th day of November, 1892.

4th. Said real estate is further described on the Dick plat, being the original plat of said city, as lots Nos. one (1) and two (2) of block No. twenty-four (24) of said plat, as filed in the U. S. Land Office.

Wherefore the plaintiff prays judgment herein against defendant:

1st. For the recovery of said real estate, and damages for withholding the possession thereof.

2nd. For other and further relief.

FRANK McMASTER, Plaintiff.

H. H. HOWARD, Attorney.

No. 2053. Frank McMaster vs. Oklahoma City. Amended petition. Filed Sept. 22, 1899. B. D. Shear, clerk. H. H. Howard, att'y.

To said petition the defendant, on the 10th day of October, 1899, filed its demurrer, in words and figures as follows, to-wit:

"TERRITORY OF OKLAHOMA, } ss.
County of Oklahoma. }

In the District Court.

FRANK MCMASTER, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, Defendant.

DEMURRER.

Comes now the defendant, The City of Oklahoma City, and demurrs to the petition of the plaintiff filed on the 22nd day of September, 1899, and for cause and grounds of said demurrer, says: That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff, and against said defendant.

THE CITY OF OKLAHOMA CITY,
Defendant.

By JOHN WRIGHT AND
DOUGLAS AND DOUGLAS, Its Attorneys.

No. 2053. Frank McMaster, plaintiff, vs. The City of Oklahoma City, defendant. Demurrer. Filed in the District Court of Oklahoma County, O. T. October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Re-filed by leave of court, Nov. 20, 1899. B. D. Shear, clerk.

Which demurrer was by the court overruled, to which the defendant excepted.

That thereafter on the 24th day of November, 1899, the defendant filed its answer in said cause, which is in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA, }
County of Oklahoma, } ss.

In the District Court.

FRANK MCMASTER, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, Defendant.

ANSWER.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff in said cause, on the 22nd day of September, 1899, denies each and every allegation and averment therein contained, except such as hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class, as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition, is a part of the original townsite of the city of Oklahoma City, in the Territory of Oklahoma, and is situated and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears upon the original plat and survey of said city, which said plat and survey was approved by said board No. 2, of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by the direction of said board, in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One of plats of the records of said county, at pages two, three and four of said book.

That said public highway in said city, to-wit, said Grand avenue, with the said land claimed by

plaintiff included therein, was and had been for more than one year prior to the approval of said plat and survey, by said board No. 2 of townsite trustees, and the filing of said plat so approved, in the office of the register of deeds of Oklahoma county, as aforesaid, and has been at all times since, used and occupied exclusively as a public highway, and a street of said city by the inhabitants of said city and Territory, at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time in possession of said parcel of land, now claimed by him, and had no interest therein.

Wherefore defendant prays judgment for its costs herein against said plaintiff.

THE CITY OF OKLAHOMA CITY,
Defendant,
By JOHN H. WRIGHT, City Attorney, and
DOUGLAS AND DOUGLAS, Its Attorneys.

No. 2053. Frank McMaster, plaintiff, vs. The City of Oklahoma City, defendant. Answer. Filed in District Court, Oklahoma County, O. T., Nov. 24, 1899. B. D. Shear, clerk, by M. McKinley, deputy.

And on the 5th day of Feb. 1900, the plaintiff filed his reply, in words and figures as follows:

TERRITORY OF OKLAHOMA, } ss.
Oklahoma County, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs. No. 2053.
THE CITY OF OKLAHOMA CITY, Defendant.

REPLICATION.

Now comes plaintiff, for replication to the answer filed herein, says:

He denies each and every allegation of said answer, and every and all of the averments therein, which contradict the averments, counts and allegations of the plaintiff's petition filed herein.

Wherefore, he, the plaintiff, prays judgment as asked in said petition.

FRANK McMASTER, Plaintiff.
H. H. HOWARD, Att'y for Plaintiff.

No. 2052. Replication. Frank McMaster vs. Oklahoma City. Replication. Filed in District Court, Oklahoma County, O. T., Feb. 5th, 1900. H. H. Howard, attorney. B. D. Shear, clerk, by M. McKinley, deputy.

And on the fifteenth day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the Territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the townsite trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster vs. The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893, with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses are then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case; the journal and the order made by the court in case No. 278, of the district court of Oklahoma county, entitled Frank McMaster vs. Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue in said cause. And thereafter the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection, overruled. Exception.

The defendants proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page 11-12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty

dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review.

Opinion of the court by IRWIN, J.:

The assignments of error in this case may be condensed into three, viz: First, overruling the demurrer of defendant to plaintiff's petition. Second, error of the court in setting aside the order of the court made granting a new trial to the defendant, as a matter of course, without showing cause, entered in the journal, and the reinstating of the judgment in favor of plaintiff; and third, error of the court in rendering judgment in favor of the plaintiff, instead of the defendant.

While the assignments of error made by the plaintiff in error are more numerous than these, we think these three assignments include all of those assigned by the plaintiff in error. Plaintiff in error makes eight assignments of error, but his second and third, it seems to us are included in the first assignment of error as herein set forth. The fourth assignment of error charges that the court erred in admitting as evidence against said plaintiff in error, and over its objection, a copy of a certain pretended judgment of the district court of Canadian county, rendered in an action in said last named court, in which the defendant in error was plaintiff, and the townsite trustees were defendants; and fifth, the court erred in admitting over the objection of the plaintiff in error, a copy of a certain order or judgment of the said district court of Canadian county, made at Kingfisher county, on the 13th day of October, 1893, in an action between the said parties. The sixth and seventh assignments of error are simply general assignments of error in admitting improper evidence on the part of plaintiff, and the eighth, that said district court erred in rendering judgment in favor of defendant in error, instead of plaintiff in error. We think all

the fourth, fifth, sixth and seventh assignments of error can be considered in the eighth, to-wit, that the court erred in rendering judgment in favor of the plaintiff.

The first and second assignments of error as herein set forth it will not be necessary for this court to pass upon, because by the long and established and well settled rule of this court, founded upon the adjudication of many of the supreme courts of other States and Territories, on the same question, these assignments of error have been abandoned by the plaintiff in error. It is a well settled rule of this court that where error is assigned, and the attor- ney for the plaintiff in error fails to insist upon and argue the same in his brief, this court will treat such assignment of error as having been abandoned.

In the case of Gardenhire vs. Gardenhire, 2 Okla. 484, this court says:

"Where errors are assigned in the petition in error but are not mentioned in the argument or brief of counsel and are not relied upon in the argument or brief for the reversal of the judgment complained of, they will be deemed waived and abandoned and will not be regarded by the Supreme Court."

In Peters vs. The United States, 2 Okla. 136, this court in an opinion rendered by the present Chief Justice, says:

"A number of other rulings of the trial court are complained of and errors assigned calling in question their correctness, but as they are not discussed in appellant's brief, they must be taken as waived and abandoned, and we shall not give them consideration."

In the case of Hurst vs. Sawyer, 3 Okla. 296, this court says:

"An assignment of error, which is not relied upon in the brief of counsel for a reversal of the case, will not be considered by this court, nor will this court review a question partially discussed, when counsel, in closing his brief, chooses to abandon it, and rely entirely upon another proposition, and when counsel on the other side have relied upon such withdrawal."

In Provin vs. Lovi, 6th Okla. 94, the court says:

"Where an error is assigned and not presented and argued in the brief of counsel for appellant, and no authorities are cited in support of the contention and counsel for plaintiff treat the question as abandoned, this court will not review the same."

In Penny vs. Fellner, 6th Okla. 386, the court says:

"This court will not examine the record filed herein, in search of prejudicial errors which are not clearly pointed out and insisted upon in the brief of the complaining party, but all such errors (if any) will be considered as waived."

In Huntley vs. The Territory, 7th Okla, 60, this court says:

"Numerous other errors are assigned in the petition in error. We have considered all that have been presented in the briefs, or argued by counsel for plaintiff in error. Under the settled rule of this court such assignments of error as are not presented and relied upon in the argument or brief of counsel are deemed waived and abandoned, and will not be considered by this court."

This doctrine has been repeatedly followed and often sanctioned by the Kansas supreme court. In the case of Topeka Primary Association vs. Martin, 39 Kans. 750, the court there holds:

"That errors not specifically pointed out and relied on in the brief of counsel, will not be considered."

In the case of Wilson vs. Fuller, 9th Kansas, 176, the court say:

"Where errors are assigned in the petition in error, but no reference is afterwards made to them, either by oral argument or in the brief of counsel for plaintiff in error, the supreme court will take no notice of them."

In School District vs. Foster, 11 Kans, 447, it is said:

"Other errors were assigned in the petition in error, but as they have not since been referred to, in the brief of counsel or otherwise, we suppose they have been abandoned, and we shall therefore take no notice of them."

In Davis vs. Filmore, 15, Kans. 333, the court holds:

"Where error is assigned but not briefed, it must be presumed to have been waived and abandoned."

In Campbell vs. Phillips, 28th Kans. 754, the court says:

"Of course our inquiry will be limited to the single matter counsel discuss in their brief."

In Bailey vs Dodge, 28 Kans. 72, it is held:

"Where errors are assigned but not insisted upon in the brief of counsel, the supreme court will not consider them."

In the State of Kansas vs. Stewart, 84 Kans. 250, the court, speaking by Justice Brewer, says:

"Ordinarily this court will consider only such questions as are specifically pointed out and discussed by counsel, and will not search through the record for the sake of finding errors."

This same doctrine is held in Howard vs. Cobb, 6th Ind. 5, and in Robinson vs Tipton, 31 Ala. 595.

Hence we take it that this rule is too well established, and has too long been followed by this

and other courts to now be disturbed, and as we have carefully and repeatedly searched the brief of plaintiff in error, and do not find as to the first or second assignment of error, the slightest reference, not a word nor a line thereon is contained in such argument, nor are any authorities cited; hence, following the rule, we are constrained to treat these two assignments or error as abandoned, and only notice the other assignments of error, which, in our judgment can very properly be considered in the one assignment of error which charges error of the district court in the judgment rendered.

The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence.

By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained. This land by the act of Congress was open for legal settlement on the 22d day of April, 1889. The defendant in error, in his petition herein, claims that he had on the day that such land was opened for settlement, and not before, legally entered such lots, and went into possession thereof as an occupying claimant, and that under the rules and regulations of the land office he was entitled to a deed at the hands of the townsite trustees. Now the first question to be settled in this controversy is: Was the defendant in error an occupying claimant, such as is recognized by the land laws of the United

States, and entitled to a deed at the hands of the townsite trustees? If this position is correct then under the laws regulating the granting of this tract to the townsite trustees, they held that portion of the same on which he was an occupying claimant, in trust for him. The Government by the conveyance by patent vested the title of this land in the trustees, for the express purpose of having the title conveyed to those who were entitled to claim as occupying claimants. To prove this possession, the defendant in error offered in the court below certain findings of the district court of Canadian County, Oklahoma Territory, which he claims amount to a judgment in his favor, in a certain case therein pending wherein he was the plaintiff and the townsite trustees were the defendants, said cause having been taken to Canadian county on a change of venue, from the district court of Oklahoma county, where said land is situated, and where said trustees resided.

The objection to the introduction of this judgment, of Canadian county, was that the plaintiff in error here, The City of Oklahoma City, was not a party to that record, and consequently not bound thereby; but it seems to us that as the townsite trustees, by the patent had conveyed to them the land, and by the law under which they acted was made the agent not only of all the occupying claimants, but also of the government, and held the land in trust for such claimants, that any and all persons claiming title to any portion of such land, must claim the same through the townsite trustees; that the plaintiff in error here, if any title whatever it had, must have derived the same from a common source of title, to-wit, the townsite trustees, and as such grantee of the townsite trustees

would be bound by any judgment legally rendered against such trustees.

In the case of Caldwell vs. Colorado Springs, 100 U. S. 55, it was held:—

"That as all had a right to appear, it bound all parties. The trustees represent all rights, and their action bound all claimants."

In Kennison vs. Stewart, 93 U. S. 84, it was held:

"That all beneficiaries, although not parties, are bound by judgments against trustees, unless such judgment is impeached for fraud or collusion."

The second objection urged by plaintiff in error herein to the introduction of this judgment of the district court of Canadian county in the court below, was that the findings do not amount to a judgment. What is a judgment? We think it is a final conclusion by a court of competent jurisdiction of a question of law or fact, at issue between the parties thereto, and properly submitted for adjudication. Now in this case the proper parties were before the court, to-wit: the defendant in error, who claimed the right to a deed, and the townsite trustees, in whom the government had vested the title, for the purpose of ascertaining who the legal occupying claimants were, and who was entitled to deeds for the various tracts of land embodied in the patent.

Now as the court found the facts and decided the question submitted to it, and as no question of jurisdiction was there raised, and as no question of jurisdiction is raised in the district court in this case, or in this court, on appeal, and as no appeal was taken from the findings and judgment of the district court of Canadian county, we think the

presumption obtains that the court had jurisdiction of the subject-matter and of the parties, and that the necessary preliminary steps to give the court jurisdiction had been complied with; this being true, we are at a loss to see why the finding of that court as to the facts therein submitted were not binding and conclusive upon not only the parties, but all persons claiming title under or through them. Now what did the district court of Canadian county find as to the facts? By a reference to the copy of the records of that court as shown in Exhibit A, of the case made herein, it will be seen that that court there found that the defendants in that case, Edgar N. Sweet, Levi E. Coe and David H. Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof, under the act of Congress approved May 14th, 1890. That said tract of land described in said patent to said trustees, was on the 22nd day of April, 1889, opened to settlement under the act of Congress approved March 2nd, 1889. That such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and was at the time of said finding still held and occupied. The court further finds that on said 22d day of April, 1889, the people then occupying said townsite had platted said tract of land into lots, blocks, streets and alleys, and the court further finds that the plaintiff there (that is the defendant in error herein) on said day, to-wit: the 22nd day of April, 1889, legally entered upon and occupied the particular piece or parcel of ground in controversy in this suit, and has continued to claim the same, that said piece or parcel of ground at that time was lots one and two in block twenty-four according to the plat. The court finds

that subsequent to such occupancy, and prior to the conveyance to said trustees, a different plat and arrangement of the streets, alleys, lots and blocks, was adopted and enforced by the parties occupying said townsite; that by said change of the plat the land claimed by the plaintiff was thrown into the street in Grand avenue, and the court finds that the plaintiff did not consent, but objected to said second plat, and has never consented thereto or acquiesced therein. That thereafter the plaintiff in that case (defendant in error here) was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said ground. That on the 21st day of April, 1891, the plaintiff applied to said defendants as said trustees, for a deed to said lots, that said trustees found the facts substantially as above stated, but declined to issue a deed therefor, and the court further finds that said City of Oklahoma City has appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said trustees: the court further finds that said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city.

Now this finding of the court shows that at the time that this land was opened for settlement under the act of Congress the defendant in error herein had legally entered upon said tract of land, and was occupying it in accordance with the rules and regulations of the Land Department. That being true we take it that his interest and rights in said land attached at that time. That when he

had complied with the rules and regulations of the Land Department, he was entitled to a deed. That he had a vested interest in these lots, and that any other occupying claimant, or any number of occupying claimants, who made up the townsite, at that time or subsequent, had no right to so change the plat as to take from him his interests in said lots, and put them into a public street or highway without his consent. Such a proceeding would be in violation of the constitution of the United States, and would be taking private property for public use, without compensation. The townsite trustees would have no right to deprive him of any property that he might have by virtue of his prior settlement, in these lots, and devote it to street purposes, without his consent and without compensation. His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement upon these lots, which, according to the findings of the district court of Canadian county, was on April 22nd, 1889. If at that time he had complied with the law, and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the townsite trustees, or the city of Oklahoma City, could take away his rights without his consent, except upon some legal proceeding, and for adequate compensation.

In the case of Sturr vs. Beck, reported in the 133 U. S. at page 545, the Supreme Court of the United States say:

"* * * Any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws shall be allowed the same time

to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws, the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement."

In Witherspoon vs. Duncan, 4th Wall. 210-218, it is said:

"* * * In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * *"

In the decision in the case of Sturr vs. Beck, supra, the court says:

"* * * And as to mere settlement with the intention of obtaining title under the preemption laws, while it has been held that no vested tight in the land as agaiust the United States is acquired, until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants.'"

In Burlington K. and S. W. R. Co. vs. Johnson, 16 Pac. 125, the supreme court of Kansas say:

"A settler on the public lands of the United States who makes a valid homestead entry, and continues to reside on and improve the land entered,

in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon, and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned.

"Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor.

"A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."

Section 2339 of the Revised Statutes of the United States provides:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

But it may be contended that the defendant in error was not in the possession of said lots, and has abandoned the same, but a reference to the finding of fact by the district court of Canadian county will show:

"That thereafter the plaintiff was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said grounds."

"That he did not consent but objected to the platting of said land as a street."

And under the holding of this court in the case of Cook *et al.* vs. McCord *et al.*, 9 Okla. page

200, and the holding of the United States Land Department in Betts vs. Townley, 20 L. D. 425, this is not abandonment, but preserves his entry intact.

Hence, it seems to us that if the findings of the district court of Canadian county were correct, and that the defendant in error, McMaster, was a legal occupying claimaint upon the land at the time the patent was granted to the townsite trustees, then no action of such townsite trustees or the city of Oklahoma City, or the other occupying claimants, could divest him of his right in the property in question, without his consent, and without compensation.

We think there was no error on the part of the district court of Oklahoma county, in admitting the record of this judgment as evidence.

The defendant below, the plaintiff in error here, claims that the court erred in admitting as evidence a certified copy of a certain order of the district court of Canadian county, made in Kingfisher county. But a reference to that order will show that it was an order designed to execute a previous order of that court. The order was in the nature of a mandamus, which, if the finding of the Canadian county court was that the defendant in error, McMaster, was entitled to a deed, at the hands of the townsite trustees, this would be the only adequate means by which the court could enforce such judgment. But it seems to us that the order made in Kingfisher county has but little bearing upon the merits of this case, for the reason that the rights of the parties had already been determined by the finding of the district court of Canadian county, in the order heretofore admitted by the court. If the finding of that court was correct, and its correctness, it seems

to us, cannot now be questioned after the time for appeal has expired, then McMaster was entitled to a deed at the hands of the townsite trustees, and such finding of the court was conclusive.

Hence, we think the decision of the lower court was correct, and the judgment is hereby affirmed; not intending that this opinion shall be at variance with the doctrine laid down in the case of City of Guthrie vs. Beamer, 3 Okla. 652, the facts in the two cases being different.

All the justices concurring except Burwell, J. and Burford, C. J., not sitting, and Pancoast, J., dissenting.

Dissenting opinion by Pancoast, J.:

I cannot concur in the foregoing opinion. McMaster acquired no vested interest in the land claimed by him by reason of his settlement and occupancy thereof; the land upon which he made settlement being designated by the plat and survey as a street divested him of whatever interest he may have had.

The City of Guthrie vs. H. C. Beamer, 3 Oklahoma, 652.

A townsite settler cannot maintain an action against a board of townsite trustees appointed under an act of Congress to compel a conveyance to him of property upon which he has made settlement.

The case of McMaster vs. The Townsite Trustees, tried in Canadian county, never went to judgment; the court in that case never proceeded further than to make findings of facts in the case. This was not rendering a judgment. Findings of fact by a court in a case tried to the court have no

more force nor effect than the verdict of a jury when the case is tried to a jury.

The order made in Kingfisher county did not help matters, as the judge had no power or authority to make an order or render judgment in the case when absent from the county; such order was a nullity.

A settler claiming property under the United States townsite laws, before he can maintain an action in the territorial courts to litigate his claim, must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matter through all the branches of the Interior Department. If he fails to do this he abandons his claim, whatever it may be.

By platting Government land as a townsite into lots, blocks, streets and alleys, the streets and alleys designated are dedicated as streets and alleys to public uses, and when a municipal corporation is afterwards organized covering the territory embraced in such townsite such municipal corporation where no conveyance has been made to it of the streets and alleys does not become invested in the fee of such streets so as to enable one claiming a portion thereof to maintain an action for the title thereto.

BRIEF AND ARGUMENT.

The printed record will disclose to the Court, in fact it is conceded by counsel for McMaster, that this case is taken to this court both upon writ of error and appeal. This was done simply as a matter of precaution, because the case was one

which, where the practice of courts of equity and courts of law are kept separate, is a law case. We rely, however, upon the appeal as was done in the case of Stringfellow vs. Cain, 99 U. S., 610, and that, we claim, is the proper and correct method of bringing the case here and that the case is properly here upon appeal for consideration upon the merits of the question presented before this court. An examination of the case discloses that the Supreme court of the Territory, in deciding the case, made a statement of facts of the case and applied the law thereto. The statement of facts is contained in what the court calls a "statement of the case," in the opinion of the court, written by Irwin, J. Counsel for McMaster refer to this as the opinion delivered by Irwin, J., as if it were his separate opinion. This claim is certainly untenable, because the opinion is "the opinion of the court," by Judge Irwin. But the statement of the case and the facts found therein and in the opinion of the court are certainly as much the action of the court as if they had been contained in a formal "statement of the facts of the case in the nature of a special verdict," as provided for in the Act of April 7, 1874, Vol. 1, Sup. U. S. Rev. St., 7. All that act requires is that "instead of the evidence at large, a statement of the facts of the case," as shown by the evidence, shall be made by the Territorial Supreme Court. It does not require that it shall be in the form of a bill of exceptions or in any other particular form, but it is a statement to be made by the court. That was done in this case, and any other statement could hardly have sufficed to present the questions of merit involved to this court in a more clear and comprehensive form than that which has been done, and it would have been

asking a useless thing to have required the court to have re-assembled the judges in an extra session in order to have made a second statement of facts of the case, which would no doubt have been in nearly the same language and covered the same facts as those already stated in the court's decision.

This court, in examining what is presented, is not called upon to review any of the evidence in the case, because there is no dispute in this evidence. The reply of McMaster contained in the statement of the case by the Supreme Court of Oklahoma (page 62), and which would not have been contained in a separate "statement of the facts of the case," if made, because not a part of the evidence, but of the record, did not traverse the allegations of the city's answer as contained on page 61, that the parcel of land claimed by plaintiff and described in his petition, is a part of the original townsite of Oklahoma City, and situated in Grand Avenue, a public highway and street of said city, as appeared upon the original plat and survey of said city, approved by Board No. 2 of Townsite Trustees of Oklahoma City, on the 6th day of September. 1890, and filed and duly recorded, and that said land had been a part of said street for more than one year prior to the approval of said plat and survey by said Board of Trustees; and the only evidence offered by McMaster in support of his title to this land (pages 35 to 38), clearly shows the facts claimed by the city to be true, and which facts were found by the Supreme Court in its opinion. The claim of title of McMaster was therefore based entirely upon the finding of fact made in the case of McMaster against the Townsite Trustees in the

District Court of Canadian County, and the order made in pursuance thereof, and it was wholly upon the facts found in these findings, and none other, that the Supreme Court of the Territory bases its opinion sustaining McMaster's title in this case. This appears on pages 66, 67 and 68 of the printed record, and the court states these findings, beginning with the statement "the evidence in this case shows that the lots in controversy were a part of the tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence." * * And referring to the findings upon which the decision is based, the court says:

"This being true, we are at a loss to see why the findings of the court as to the facts therein submitted, were not binding and conclusive, not only upon the parties, but all parties claiming title under or through them."

And preceding this statement are the findings of fact, accompanied with the statement of findings.

"Now what did the District Court of Canadian County find as to the facts? By reference to the record of that court as shown in Exhibit 'A,' of the case made herein, IT WILL BE SEEN THAT THE COURT THERE FOUND. * * * That court further finds that on the 22nd day of April, 1889 * * * The court finds that subsequent to such occupancy * * * Now this finding of the Court shows that at the time this land was so opened for settlement * * * This being true, we take it * *"

The Exhibit "A" referred to was the Exhibit "A" contained in the "Case Made" in the District Court, and the finding made from it was the Exhibit "A" beginning on page 34 of the

printed record, and intended to cover both Exhibits "A" and "B," for the court there recites the substantial part of the findings as made by Judge Burford, and thus we claim carried the same into the opinion of the court, by its reference, with the same force and effect as if they had been specifically set out therein. And these findings, with the statement of the case contained in the opinion of the court, also show the facts upon which we base three of the important questions of law which we wish to present to this court in our argument and brief on the case under our assignment of errors which appear in the record now printed, and ask the court to consider. These are:

First—That the District Court of Oklahoma County had no jurisdiction to render judgment against the defendant there after it had vacated its first judgment and granted a second trial in ejectment under the statute; and

Second—That the plaintiff McMaster was not pursuing his proper remedy, and therefore is not entitled to the judgment rendered, because he could not maintain an action of ejectment to recover land held as a public street and highway, as this is admitted by the pleadings to be, and found by the Supreme Court of Oklahoma, and not contested by any proof presented in the record; but that his remedy was by pursuing the Oklahoma Statute to obtain damages for property taken and appropriated for public use, even if his claim of title was well founded; and

Third—Because by act of Congress and the patent to the trustees and the trustees' action in approving the plat of the townsite, the land became vested in the public for public purposes.

There are also a number of other questions

which we wish to present and which are based on the errors assigned upon the decision of the Supreme Court of Oklahoma.

We can hardly conceive of any statement of facts which can be made by the court in this case which will more clearly present to this court these questions and the other ones presented than are contained by what the Supreme Court has already made, and which has been certified and appears in the printed record before this court. The facts found by the court in the statement and findings to which we have referred cover all the facts necessary to present these questions.

This being true, we claim the authorities presented by counsel for McMaster do not support their contention that there is no statement of facts of the case here upon which the court can consider the merits of the questions presented. None of the cases cited present a case where the facts of the case and upon which the court from which the appeal was taken to this court, were presented, much less clearly and specifically presented as they are in this case.

The case of Stringfellow vs. Cain, 99 U. S., 610, is cited upon a question not in dispute here, but is particularly instructive and in point in this case. There the Supreme Court, while dismissing the motion in error, sustained the appeal and reversed the judgment of the Supreme Court of Utah, which court had reversed the judgment of the District Court because the evidence did not sustain the findings of fact, and in such case this court said:

"Other findings must be made before the case can be put in condition for hearing in this court on appeal."

And this court there, without deciding the proper practice in such cases, said:

"It is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

The court further held in that opinion that when the Supreme Court of a territory reversed the judgment of the district court because the findings of fact made by the district court were not sustained by the evidence, it was unnecessary to go through the circuity of action of sending the case back to the district court to make other findings of fact "in order to put the case in a situation for review in this court," and said:

"The District Court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from these facts may just as well be settled by the Supreme Court on the first appeal as on the second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court."

And so we claim here that if the Supreme Court of a territory can make findings of fact in its decision when it holds that the findings of the trial court are not sustained by the evidence and such a statement of facts is sufficient for review in this court, so, too, a statement of facts made by the court in its opinion which are in direct accord with what the record shows the decision of the trial court was based upon the record from which the Supreme Court of the Territory makes such findings, whether formal or informal, they are sufficient to present the questions of law desired for review by this court. The court there also based its opin-

ion upon "the facts as stated by the Supreme Court."

In the succeeding case of Cannon vs. Pratt, 99 U. S., 619, the court followed Stringfellow vs. Cain in the consideration of the questions presented by the record, and on page 623, with reference to to the opinion of the Supreme Court of Utah, said:

"In this case the rejected evidence was all before the Supreme Court, and was there considered. *In the opinion* it is in effect said that if the evidenc had been admitted in the court below, and if that court had given it all the force which could be reasonably claimed, the result must have been the same. Under these circumstances we must consider the case as coming here from the Supreme Court, with the facts found upon all the evidence."

Thus the court recognized the claim which we make, that the court should consider the opinion of the Supreme Court of a territory in determining whether the court has made "a statement of the facts of the case," as required by the 1874 act.

The case of Hecht vs. Broughton, 105 U. S., 235, is a proceeding in error to the Supreme Court of the Territory of Wyoming taken in a case where there was no trial by jury. The motion to dismiss the writ of error was sustained because the case should have been brought up by appeal and not on error. There is nothing in the decision of this court in that case which prevents the facts as found by the Supreme Court of the Territory in this case from being taken as a statement of facts sufficient to present the application of the law as applied thereto, for review by this court.

In Idaho & Oregon Land Improvement Co. vs. Bradbury, 132 U. S. 509, the Clerk had failed to sign the certificate transmitting the record to this court, but the court permitted an amendment

and considered the act of April 7, 1874, referred to, and said:

"The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law."

Now we are not asking, in the case at bar, any review in matter of fact, but are only asking this court to pass upon the questions of law which we present upon the facts as presented by the decision of the Supreme Court of the Territory of Oklahoma, and we are asking this court to consider the facts as they are stated in the opinion of that court, and to correct the application of the law thereto.

A review by this court of the case of Marshall vs. Burtis, 172 U. S. 630, cited, will disclose that there was no finding of fact made by the Territorial court in its opinion or otherwise, and so the court necessarily concluded:

"There was no finding of fact by the district court or by the Supreme Court, hence no 'statement of facts in the nature of a special verdict,' and we must assume that the judgment of the district court was justified by the evidence."

But in this case no such assumption is necessary, and no recourse to the evidence is required, for the court has found what the facts were to which it made its application of law, which alone we claim to be incorrect.

In the case of Gray vs. Howe, 108 U. S. 12, the syllabus reads:

"Where the Supreme Court of a Territory on appeal reverses a judgment of a district court and sets aside findings of fact, and makes no new statement of facts in the nature of a special verdict, the

judgment of the Supreme Court of the Territory must be affirmed on appeal."

But in the case at bar there was no reversal of the district court, but there was a statement of facts of the case made by the Supreme Court of the Territory.

In the case of Salina Stock Company vs. Salina Creek Irrigation Company, 163 U. S. 109, it appears that:

"There the Supreme Court of the Territory set aside the findings of the trial court, and directed a decree on the evidence, at the same time making its own findings from the evidence; and this court refused to disturb the decree of the Supreme Court,"

and quoted from Stringfellow vs. Cain, supra,

"Without undertaking to decide what would be the proper practice in an ordinary civil action when a judgment is reversed because a new trial was refused in the district court, we are clearly of the opinion that in a suit like this, where all the evidence is before the Supreme Court that could be considered by the district court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

This court further said:

"It has been frequently held that the authority of this court on appeal from the Supreme Court of a Territory is limited to determining whether the court's findings of fact support its judgment or decree, or whether there is any error in rulings duly excepted to in the admission or rejection of evidence. * * * and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, * * * "

The language of this court in that point bases the determinations of the court upon the question

of the sufficiency of the record, to present the facts not upon the *form* in which the findings of the Supreme Court of a Territory are presented, but whether the findings of fact support its judgment, or were sufficient to sustain the judgment rendered. That case was affirmed because there were no findings of fact for the Supreme Court to review, and not because the facts *found were not* in some prescribed form.

The case of Zeckendorf vs. Zeckendorf, 171 U. S. 686, is a decision announced without opinion on the authority of earlier cases on the point.

In the case of Cohn vs. Daley, 274 U. S. 539, there was no statement of facts on which the Supreme Court of Arizona had based its opinion.

The case of United States vs. Hooe, 1 Cranch., 318, the declaration was made that a statement of facts must accompany the transcript, but nothing which would be authority for holding that the statement of facts made by the court in this case is insufficient.

There is nothing in the case of Davis vs. Fredericks, 104 U. S. 618, which is opposed to the view we take. There a statement of facts was made by the Supreme Court of Montana and considered by this court.

The pivotal point in the brief of counsel for McMaster is contained in their claim that the opinion of the court does not contain such a statement of facts as may be considered by this court, and the decision is referred to as the opinion of "Irwin, J.," meaning, we suppose, that the findings therein contained should be considered as only the statement of one judge. This is certainly untenable, for the opinion is the "opinion of the court by Irwin, J.," (page 63), "and is concurred in (page 71)

by sufficient of the judges to make it the opinion of the court. It is, therefore, we claim, equivalent to a statement made by the court, and it is certainly so certified here. The authorities cited, together with other cases determined by this court, do not sustain their claim.

The statement made by the Supreme Court of Arizona in Thompson vs. Ferry, 180 U. S. 484, does not disclose the facts, or any of them, to which the court applied the law. It is a mere recital of proceedings, with no statement of the facts upon which the court was basing its decision of law.

In the case of Stone vs. United States, 164 U. S. 380, there was a finding that the claimant had not proved his case, but there was no finding of the facts proved or presented at the trial. The court held:

"We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings",

and the court then went on to say

"Neither is this a case like the United States vs. Clark, 96 U. S., 37, in which in one finding was stated the testimony and in another the conclusions as to the ultimate fact, in which case the court held it might consider the sufficiency of such testimony to establish that principal fact, for here the finding does not disclose the testimony, but only describes its character, and, without questioning its competency, simply declares its insufficiency."

That decision certainly is no support for the claim that this court may not refer to the opinion of the court to determine the facts upon which its decision is based, when that opinion specifically sets out the facts to which the court has applied the law.

In the case of Saltonstall vs. Birtwell, 150 U. S., 417, this court held that the findings of the Circuit Court were insufficient to support the judgment which the court has rendered, and held that a resort could not be made to the opinion of the court to help out these insufficient findings in order to support a judgment based on insufficient findings; while in the case at bar we claim that the court's judgment is erroneous as a matter of law, on the facts on which it states it is based. In the case at bar the statement of facts upon which the Supreme Court bases its judgment is contained in the opinion of the court. Besides in this case of Saltonstall vs. Birtwell, this court reversed the case and remanded it for a new trial because of insufficiency of facts found, and here we claim that the facts found and stated by the Supreme Court of Oklahoma require a different judgment than that rendered by the court on those facts.

The case of Dickinson vs. The Planters Bank, 16 Wallace, 250, was a proceeding in error of the Circuit Court. The court held:

"It is very clear that in this case there were no special findings of fact upon which any judgment for the plaintiff could have been rendered." and

"It is impossible to regard anything that appears in this case as equivalent to a special verdict."

And we respectfully suggest that the findings which appear in the opinion of the Supreme Court of Oklahoma, whose review we ask here, are "equivalent to a special verdict," and, in fact, were fuller than a special verdict, because not only are the facts given, but special reference is made to the findings of fact made by Judge Burford in the District Court as an exhibit to the case, and being so

referred to, should be considered by this court the same as if fully set out in the opinion.

In the case of Insurance Company vs. Tweed, 7 Wallace, 44, the court, in speaking of the statement of facts, says:

"The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts, as found from the evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment."

We have thus reviewed every case cited by counsel in their brief on the question involved here. This court, however, has spoken elsewhere on this question, and we think, decisively in our favor, and shows that what is meant by the decisions of the court on this question is not that the Supreme Court will not consider the findings made by the Supreme Court of a Territory in order to determine whether the law has been correctly applied, because the findings are stated in the opinion instead of being recited in a separate document, but that the court will not investigate the evidence presented in order to determine whether the findings which the court has made are supported by sufficient evidence.

In the case of Haws vs. Victoria Copper Mining Co., 160 U. S., 303-313, the court said:

"We cannot, therefore, enter into an investigation of the preponderance of proof, but confine ourselves to the findings and their sufficiency to support the legal conclusions which the court below has rested on them. THE STATEMENT OF FACTS CONTEMPLATED BY THE STATUTE IS ONE TO BE MADE BY THE SUPREME COURT FROM WHOSE JUDGMENT THE APPEAL IS TAKEN. But where that court

affirms the findings of the trial court, being thus adopted by the Supreme Court of the Territory, they subserve the purpose of the finding of fact upon the appeal to this court. Stringfellow vs. Cain, *ubi supra*. Guided by this rule, we will examine the errors pressed upon our attention."

Now this authority clearly holds that the statement of facts contemplated by the statute in question should be made by the Supreme Court. That statement of facts has been made in this case. That case is affirmed in Gildersleeve vs. New Mexico Mining Co., 161 U. S., 573-577.

But in any event this cause should not be affirmed, as moved by counsel for McMaster, defendant in error.

We supplement this brief with a motion which will permit the supplying of the statement of facts if it should be held necessary. The case of Zeckendorf vs. Zeckendorf, 123 U. S., 617, cited by counsel, we consider would not entitle them to an affirmance of the judgment in this case, even if our contention herein presented were held incorrect. In that case findings of fact had been made by the Supreme Court of Arizona. The errors assigned related only to the sufficiency of the evidence to support these findings. That question of course could not be considered here, and no supplement or amendment to the record would have enabled the courts to have presented the questions sought to be presented on the assignment. It was therefore held apparent to the court that if the case was kept there longer, it would be for delay only, but the relief which we now ask, if the court should consider such course necessary, would avoid the objection made by counsel for McMaster.

We respectfully present the foregoing brief to

the court in confidence that our position is fully sustained by the decisions herein referred to, but in order that there may be no question that our client's case may be considered upon the facts presented in the record and passed upon in the opinion of the Supreme Court of Oklahoma, and upon the errors of law which we have assigned to the application of the law to those facts, and which we will call to the court's attention in our brief on the merits of this case at the proper time, we present this brief and the motion which follows.

Respectfully submitted,
S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error.
No. 137.

ALTERNATIVE MOTION OF PLAINTIFF IN ERROR FOR AN ORDER TO THE SUPREME COURT OF OKLAHOMA TERRITORY TO TRANSMIT A STATEMENT OF THE FACTS OF THE ABOVE CAUSE IN THE NATURE OF A SPECIAL VERDICT.

Comes now the plaintiff in error, the City of Oklahoma City, and moves the court to make an

order upon the Supreme Court of Oklahoma to make, certify and transmit to this court a statement of facts of the above cause in the nature of a special verdict, said order to be made if, in the judgment of this court, upon consideration of plaintiff's motion to affirm the judgment appealed from, it is necessary that such statement be presented with the record in order that this court may consider and review the decision of the Supreme Court of Oklahoma and determine whether the law has been correctly applied to the facts presented by the record of said cause in the Supreme Court of Oklahoma, and in order that this court may determine whether certain findings of fact made by Judge Burford in the case of Frank McMaster vs. The Townsite Trustees, in the District Court of Canadian County, Oklahoma, were competent and admissible as evidence in said case, and whether, if admissible, the facts therein found and recited, in the opinion of said Supreme Court, warrant the judgment rendered. Plaintiff in error states that until the question was raised by counsel for Frank McMaster, defendant in error, as to the necessity for any such statement, counsel for said city considered the statement of the case and facts stated and presented by the opinion of the Supreme Court of the Territory of Oklahoma sufficient to present these questions and the questions sought to be presented to this court in their behalf on the merits of this cause.

That this motion is not made for the purpose of delay, but in order that justice may be done, and this cause presented upon the merits; that this case was not finally disposed of by the Supreme Court of Oklahoma until the 10th day of September, 1903, when the petition for re-hearing was de-

nied (see record, page 76), and the petition for appeal and writ of error to the Supreme Court of the United States and the order for such writ of error and appeal were presented and obtained and filed in the Supreme Court of Oklahoma, October 10, 1903, and that this cause has been prosecuted by the appellant with all due expedition.

S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER,
Attorneys for the City of Oklahoma City,
Plaintiff in Error.

TERRITORY OF OKLAHOMA,
Logan County. } ss.

A. G. C. Bierer, being duly sworn, deposes and says that he is counsel for the plaintiff in error, the City of Oklahoma City, in the above entitled cause; that he has read and knows the contents of the above and foregoing motion, and the statements therein contained are true, and that he knows that the appeal in this case is not made for the purpose of delay, but is made in good faith for the purpose of obtaining a decision of this court upon the merits of the questions presented; and this motion is now made for a like purpose in case this court should consider a formal statement of the facts of the case should be made by the Supreme Court of Oklahoma, in addition to the one presented in the statement of the case and opinion of the court, as appears from the record.

A. G. C. BIERER.

Subscribed and sworn to before me this 17th day of November, 1904.

W. M. BRONSON,
Notary Public.

[SEAL.]

My commission expires December 27, 1906.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

City of Oklahoma City,
Plaintiff in Error,
vs.
Frank McMaster,
Defendant in Error.
No. 137.

BRIEF ON ABOVE MOTION.

In the case of Idaho Land Co. vs. Bradbury, 132 U. S. 509, in which the clerk of the Supreme Court of Idaho Territory failed to sign the certificate to the record transmitted, the court made an order allowing the record to be withdrawn and amended by procuring the signature of the clerk of the Supreme Court of the Territory to the certificate of authentication. A motion to dismiss the case had been made on the ground that the record was not authenticated. Upon this the court said:

"Considering the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

It was the clerk's duty in that case to have properly authenticated the record. It is the court's duty in this case, under the act of April 7, 1874, 18 Stat. at Large, pages 27-28, to make "a statement of facts of the case in the nature of a special

verdict," and this statement the act provides "shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Now we contend that if a more formal statement of the facts than that which this record presents is deemed necessary by this court, then it is the duty of the Supreme Court of Oklahoma to present such statement, and, if so considered necessary, then we wish this statement, in order to present the merits of this cause to this court. Such an order need delay this proceeding very slightly, and we respectfully suggest, can be made and returned to this court in a short time and with but slight delay, and this leave to amend these proceedings by adding this statement should be permitted, if by the court considered necessary, as above suggested, in furtherance of justice.

The order asked for by counsel for defendant in error, that is, the affirmance of the judgment appealed from, certainly should not be made, even if the more formal statement of facts of the case is deemed necessary by the court; for if the record is not sufficient to present the errors assigned and relied on, then the appeal should only be dismissed without prejudice to another appeal within the time allowed by law, and without delay, unless this court will permit the correction to be made by the Supreme Court of Oklahoma, furnishing the statement of facts of the case considered necessary. But that will entail the re-certification and printing of the same record now before the court, at considerable expense, and would entail a year's delay, a thing we do not ask or wish. Whereas, the furnishing of the statement, as we ask to be done, if

deemed necessary, need not delay the case more than from one to three months.

We therefore very respectfully ask that an opportunity be given to supply the formal statement of facts of the case, in the nature of a special verdict, if, upon considering plaintiff's motion and brief and our answer brief, such statement, in addition to the statement of the case and facts presented in the opinion of the court, as appears from the record now printed, is necessary to present the errors assigned by us on our appeal.

Very respectfully submitted,

S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER.
Counsel for Plaintiff in Error.

TERRITORY OF OKLAHOMA,
Logan County. } ss.

A. G. C. Bierer, being duly sworn, deposes and says that on November 17, 1904, at the City of Guthrie, Logan County, Oklahoma Territory, he deposited in the United States mail a letter addressed to Mr. Francis J. Kearful, at his office address, No. 52 William Street, New York City, New York, together with three (3) copies of the forego ing answer to motion to dismiss and affirm, and brief in support thereof, and alternative motion of plaintiff in error for an order on the Supreme Court of Oklahoma Territory to transmit a statement of the facts of the above cause, in the nature of a special verdict, and brief in support thereof; the said Francis J. Kearful being counsel of record for

defendant in error, Frank McMaster, and that being his proper address; said letter was deposited postpaid, and the time when it was so mailed was such as to reach said counsel by due course of mail seven days before November 28, 1904, the time fixed by the notice given by defendant in error, of the presentation of his motion to dismiss the writ of error and affirm the judgment appealed from, to which the said answer, briefs and motion of plaintiff in error are a response.

A. G. C. BIERER.

Subscribed and sworn to before me this 17th day of November, 1904.

W. M. BRONSON,

[SEAL.] Notary Public.

My Commission expires Dec. 27, 1906.